

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

Southern District of Texas  
OCT 16 2007  
Michael N. Milby, Clerk  
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In re ENRON CORPORATION §  
SECURITIES LITIGATION §

\_\_\_\_\_  
This Document Relates To: §

MARK NEWBY, *et al.*, individually §  
and on behalf of all others similarly §  
situated, §

Plaintiffs, §

v. §

ENRON CORP., *et al.* §

Defendants. §

\_\_\_\_\_  
THE REGENTS OF THE UNIVERSITY §  
OF CALIFORNIA, *et al.*, individually and §  
on behalf of all others similarly situated, §

Plaintiffs, §

v. §

KENNETH L. LAY, *et al.* §

Defendants. §

Civil Action No. H-01-3624  
(Consolidated)

**THE BANK DEFENDANTS' MOTION TO MODIFY SCHEDULING ORDER  
AND REQUEST FOR EXPEDITED CONSIDERATION**

Defendants Bank of America Corporation, Credit Suisse First Boston Corp.,  
Citigroup, Inc., Deutsche Bank AG, Barclays PLC, Merrill Lynch & Co., Inc., J.P.  
Morgan Chase & Co., Canadian Imperial Bank of Commerce, and Lehman Brothers  
Holdings Inc. (collectively referred to as the "Bank Defendants") file this Motion to

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Modify Scheduling Order and Request for Expedited Consideration, and respectfully show the Court as follows:

## **I. INTRODUCTION**

The Bank Defendants have been precluded, despite their diligent efforts, from obtaining class certification discovery due to a mandatory statutory stay on all discovery in this action during the pendency of Defendants' Motions to Dismiss. Class discovery is essential to enable Defendants to formulate an evidentiary response to Lead Plaintiff's Motion for Class Certification. Accordingly, the Bank Defendants respectfully request that the Court's Scheduling Order in this action be modified to allow a reasonable time for class discovery after the Court rules on Defendants' pending Motions to Dismiss, and to allow for briefing on class certification issues after the close of class discovery.

## **II. BACKGROUND FACTS**

On February 27, 2002, prior to the filing of the Consolidated Complaint and the addition of the Bank Defendants to this action, the Court entered a Scheduling Order, which provided as follows:

1. Consolidated Complaints filed by April 1, 2002;
2. Motions to Dismiss due May 1, 2002;
3. Oppositions to Motions to Dismiss due June 3, 2002;
4. Replies to Oppositions to Motions to Dismiss due June 17, 2002;
5. Class Discovery begins July 1, 2002;
6. Class Discovery ends September 2, 2002;
7. Plaintiffs' Motions for Class Certification due October 1, 2002;

8. Defendants' Oppositions due November 1, 2002; and
9. Plaintiffs' Replies due December 2, 2002.

As required by the Scheduling Order, all Defendants filed Motions to Dismiss on May 8, 2002.<sup>1</sup> The filing of Defendants' Motions to Dismiss effected an automatic, statutory stay of discovery and other proceedings pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA"), which provides that "all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss." *See* 15 U.S.C. § 78u-4(b)(3)(B); *see also* this Court's Order dated August 5, 2002 (the "August 5 Order"), at p. 4 n.2 (Instrument #983, attached hereto as Exhibit A) (discussing the PSLRA discovery stay). The PSLRA stay will not be lifted unless and/or until the Court enters an order denying Defendants' Motions to Dismiss, which are currently pending. *See* August 5 Order at pp. 4-5.

Despite the PSLRA stay, which came into effect after the entry of the Scheduling Order, the Scheduling Order appears to direct that class certification discovery was to begin on July 2, 2002 and end on September 2, 2002. Accordingly, in an abundance of caution, the Bank Defendants, and others, attempted to comply with the Scheduling Order by serving written class discovery requests on the class representatives, and by noticing the class representatives' depositions, all the while preserving Defendants' objections that all discovery is subject to the PSLRA stay. *See, e.g.*, The Bank Defendants' First Set of Requests for Production of Documents to All Class Representatives, at p. 2 n.1 (attached hereto as Exhibit B) (preserving the Bank

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<sup>1</sup> Defendants filed their Motions to Dismiss on May 8, 2002 rather than May 1, 2002 because on March 22, 2002 the Court entered an order that extended the deadlines in the February 27 Scheduling Order by one week for item numbers 1-4 above. The March 22 Order did not alter the deadlines in the February 27 Scheduling Order for item numbers 5-9 above.

Defendants' objection that all discovery is subject to the automatic PSLRA stay which is still in effect); and Notice of Deposition by Bank Defendants (attached hereto as Exhibit C).

On August 5, 2002, in the middle of the Scheduling Order's class discovery period, the Court entered an Order recognizing that "all discovery is STAYED, pursuant to the PSLRA, until the Court has ruled on the pending motions to dismiss." *See* August 5 Order, at pp. 4-5. In compliance with the August 5 Order, all parties ceased class discovery in this action.<sup>2</sup> The noticed depositions of the purported class representatives did not occur. Moreover, in apparent reliance on the Court's order, the purported class representatives declined to respond to any of the class discovery requests after August 5, 2002. Class discovery served on the purported class representatives that is unanswered or not fully answered includes the following:

- Defendant Lou L. Pai's First Set of Interrogatories to all Named Plaintiffs Regarding Class Certification Issues (attached hereto as Exhibit D);
- Defendant Jeffrey K. Skilling's First Set of Interrogatories to All Named Plaintiffs Regarding Class Certification Issues (attached hereto as Exhibit E); and
- The Outside Director Defendants' First Request for Production of Documents to all Named Plaintiffs Regarding Class Certification (attached hereto as Exhibit F); and
- The Bank Defendants' First Set of Requests for Production of Documents to All Class Representatives (attached hereto as Exhibit B).<sup>3</sup>

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<sup>2</sup> In contrast, class discovery continued, and was completed, in *Pamela M. Tittle et al. v. Enron Corp. et al*, H-02-3913, because the parties agreed that class discovery in that action was not subject to the PSLRA stay. Accordingly, the Bank Defendants in *Tittle* are not seeking any modification of the class discovery schedule with respect to the *Tittle* case, and will file their opposition to the *Tittle* plaintiffs' motion for class certification on November 1, 2002.

<sup>3</sup> On August 2, 2002, prior to the entry of the August 5 Order, Plaintiffs served objections to Outside Director Defendants' First Request for Production of Documents to all Named Plaintiffs Regarding Class Certification and The Bank Defendants' First Set of Requests for Production of Documents to All Class Representatives. To date no documents have been produced by Plaintiffs pursuant to these requests.

On August 13, 2002, the Lead Plaintiff, the Regents of the University of California (the “Regents”), filed a Motion for Protective Order that recognized the Court’s August 5 Order staying discovery, stating that the Order “stayed the noticed ‘class certification’ depositions and accompanying document discovery requests.”<sup>4</sup> *See* Lead Plaintiff’s Motion for Protective Order, at p. 1 (instrument #1000, attached hereto as Exhibit G). The Regents’ Motion requested the issuance of a protective order limiting the scope of class discovery that the Bank Defendants may take of the purported class representatives, if and/or when the discovery stay is lifted. *See id.*

The Regents filed their Motion for Class Certification on October 1, 2002. The Bank Defendants then conferred with the Regents and requested an extension of the deadline for Defendants’ Oppositions to the Motion for Class Certification to a date that would allow class discovery to be taken. The Regents opposed any such extension of the deadline for Defendants’ Oppositions. For the reasons set forth below, the Bank Defendants request that the Scheduling Order be modified to permit class discovery after the Court rules on Defendants’ Motions to Dismiss, and to extend the deadline for Defendants to file their Oppositions to the Motion for Class Certification until after the close of class discovery.

### **III. CIRCUMSTANCES REQUIRE MODIFICATION OF THE COURT’S SCHEDULING ORDER**

#### **A. The PSLRA Discovery Stay Has Precluded Defendants From Obtaining Class Certification Discovery.**

As explained above, the Bank Defendants, and others, initiated class certification discovery within the deadlines set forth in the Court’s Scheduling Order. However, as

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<sup>4</sup> In its August 13 motion, the Lead Plaintiff refers to the August 5 Order as the August 7 Order, the date of entry by the clerk. *See* Exhibit A.

recognized by the Court in its August 5 Order, the filing of Defendants' Motions to Dismiss effected an automatic, statutory stay of all discovery pursuant to the PSLRA that has precluded class certification discovery from going forward. Moreover, both the purported class representatives and Defendants relied on the August 5 Order as confirming that class discovery is stayed.

The Regents now seek to take unfair advantage of the PSLRA stay by filing a Motion for Class Certification, but opposing an extension of the response deadline to a date that would allow reasonable class discovery to be taken.

**B. Class Certification Discovery is Necessary for Defendants to Respond to the Regents' Motion for Class Certification.**

On October 1, 2002, the Regents filed their Motion for Class Certification. Pursuant to the Scheduling Order, all Defendants' Oppositions to the Regents' Motion are due on November 1, 2002. The Bank Defendants respectfully request that they be afforded an opportunity to conduct class discovery prior to responding to the Motion for Class Certification.

A plaintiff seeking class certification bears the burden of establishing that all requirements of Federal Rule of Civil Procedure 23 have been satisfied. *See Berger v. Compaq Computer Corp.*, 257 F.3d 475, 481 (5<sup>th</sup> Cir. 2001), *reh'g denied*, 279 F.3d 313 (5<sup>th</sup> Cir. 2002); *see also* FED. R. CIV. P. 23. That burden is not met by conclusory allegations. Instead, a plaintiff must satisfy the Court after its "rigorous analysis" that the prerequisites for class certification have been met. *See General Tel. Co. v. Falcon*, 457 U.S. 147, 161, 102 S.Ct. 2364, 2372 (1982); *Castano v. American Tobacco Co.*, 84 F.3d 734, 740 (5<sup>th</sup> Cir. 1996). Such an analysis cannot be undertaken without an adequate

factual record.<sup>5</sup> Indeed, Courts have long recognized that discovery is essential to determine whether the requirements for certifying a class action have been satisfied.<sup>6</sup> *See Chateau de Ville Prods., Inc. v. Tams-Witmark Music Library, Inc.*, 586 F.2d 962, 966-67 (2d Cir. 1978) (reversing grant of class certification where court refused to permit defendant to take class certification discovery); *Pittman v. E.I. duPont de Nemours & Co.*, 552 F.2d 149, 150 (5<sup>th</sup> Cir. 1977) (stating “a certain amount of discovery is essential in order to determine the class action issue and the proper scope of a class action”).

Defendants should be permitted to take discovery as to whether the Regents and the other purported class representatives have satisfied each of the requirements of Rule 23, including, but not limited to, the issues set forth in the Fifth Circuit’s decision in *Compaq*:

- the relationship between the plaintiff and the proposed class counsel;
- the plaintiff’s willingness and ability to take an active role in and direct and control the litigation;
- the plaintiff’s knowledge of the facts and the source of the plaintiff’s knowledge; and
- possible conflicts of interest between the plaintiff and other class members.

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<sup>5</sup> The Regents themselves acknowledge that discovery is necessary in their Motion for Class Certification. *See* the Regents’ Motion for Class Certification, filed October 1, 2002, at p. 13 (stating “The exact number of Class members is presently unknown and can be ascertained only through discovery, which is presently stayed”).

<sup>6</sup> Moreover, in securities cases where discovery is stayed pursuant to the PSLRA due to pending motions to dismiss, it is appropriate for a court to first rule on the motions to dismiss prior to considering the issue of class certification. *See Winn v. Symons Int’l Group, Inc.*, 2001 WL 278113, at \*2 (S.D. Ind. Mar. 21, 2001).

*See Compaq*, 257 F.3d at 479-84. Without an adequate factual record, this Court cannot conduct the required “rigorous analysis” regarding whether the Regents and the other purported class representatives have satisfied the requirements of Rule 23.<sup>7</sup>

**C. Class Certification Should Follow the Court’s Rulings on Defendants’ Motions to Dismiss.**

It is premature for the parties to engage in class certification efforts until after the Court rules on Defendants’ Motions to Dismiss. The Court’s ruling on the various Motions to Dismiss may impact the make-up of the class that Plaintiffs will seek to certify, and may impact the causes of actions available to those seeking certification. Proceeding with class certification discovery and briefing at this stage runs the risk that the parties and the Court will have to revisit these issues with additional briefing after the Court has ruled on the Motions to Dismiss. Without the benefit of the Court’s ruling on the Motions to Dismiss, the parties’ class certification briefing is based on no more than surmise as to what this Court will do with the Motions to Dismiss. Accordingly, class certification efforts should be deferred until the parties know what claims, if any, this Court will allow to go forward.

Further, in the interest of conserving both the parties’ and the Court’s resources, class discovery and briefing should take place after the Court has ruled on the Motions to Dismiss. If the Court grants the Motions to Dismiss, even as to some parties or claims, the scope of the class discovery and certification effort could be reduced for both the parties and the Court. The Court and the remaining parties would then be able to focus their class certification efforts on only those issues presented in Plaintiffs’ Complaint that have been sustained by the Court, if any.

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<sup>7</sup> The need for class certification discovery is discussed further in the Bank Defendants’ Opposition to Lead Plaintiff the Regents’ Motion for Protective Order, dated August 30, 2002



**D. “Good Cause” Exists for Modification of the Court’s Scheduling Order.**

Rule 16(b) of the Federal Rules of Civil Procedure provides that a scheduling order may be modified by leave of the district judge upon a showing of “good cause.” *See* FED. R. CIV. P. 16(b). Defendants have shown “good cause” for modification of the Court’s Scheduling Order in this case. Defendants have exercised diligence by initiating class discovery within the deadlines set forth in the Court’s Scheduling Order. Despite Defendants’ diligence, they were unable to complete class discovery prior to the Scheduling Order’s September 2, 2002 deadline due to the PSLRA’s mandatory discovery stay. Without class discovery, Defendants are unable to respond thoroughly to Lead Plaintiff’s Motion for Class Certification.

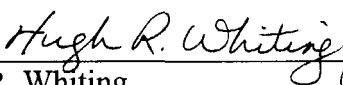
**IV.**

**CONCLUSION**

It is both essential and proper that the parties be afforded an opportunity to take class discovery prior to resolving the class certification issue. The Bank Defendants respectfully request that this Court modify its Scheduling Order to provide that, in the event the Court denies Defendants’ Motions to Dismiss, Defendants be allowed a reasonable period of time after that ruling to conduct class certification discovery of the Regents and the other proposed class representatives. Additionally, the Bank Defendants respectfully request that the Court modify its Scheduling Order to allow Defendants a reasonable period of time after the close of class discovery to file their Oppositions to Lead Plaintiff’s Motion for Class Certification. The Bank Defendants respectfully request such other relief to which they may be justly entitled.

The Bank Defendants respectfully request that the Court consider this motion to Modify the Scheduling Order on an expedited basis. Pursuant to the Local Rules for the Southern District, this motion will not be ripe for decision until 20 days after its filing. As such, the Court's ruling would be after the time for the Bank Defendants to file their Opposition to the Regents' Motion for Class Certification. Therefore, the Bank Defendants respectfully request that the Court consider this motion on an expedited basis.

Respectfully submitted,

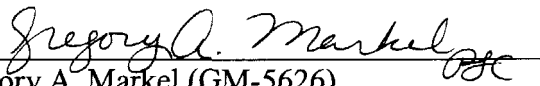
  
\_\_\_\_\_  
Hugh R. Whiting  
**Attorney-in-Charge**  
Texas Bar No. 21373500  
S.D. Texas Bar No. 30188  
David E. Miller  
Texas Bar No. 14067150  
S.D. ID. 27647  
**JONES, DAY, REAVIS & POGUE**  
600 Travis Street, Suite 6500  
Houston, Texas 77002-3008  
Telephone: (832) 239-3939  
Telecopier: (832) 239-3600

OF COUNSEL:

David L. Carden  
**JONES, DAY, REAVIS & POGUE**  
221 East 41st Street  
New York, New York 10017-6702  
Telephone: (212) 326-3939  
Telecopier: (212) 755-7306

Robert D. Micheletto  
**JONES, DAY, REAVIS & POGUE**  
77 West Wacker Drive, Suite 3500  
Chicago, Illinois 60601-1692  
Telephone: (312) 269-3939  
Telecopier: (312) 782-8585

**ATTORNEYS FOR LEHMAN BROTHERS  
HOLDINGS INC.**

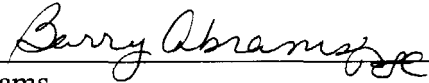
  
\_\_\_\_\_  
Gregory A. Markel (GM-5626)  
**Attorney-in-Charge**  
Ronit Setton (RS-2298)  
Nancy I. Ruskin (NR-2428)  
**CADWALADER, WICKERSHAM & TAFT**  
100 Maiden Lane  
New York, New York 10038  
Phone: (212) 504-6112  
Fax: (212) 504-6666

**ATTORNEYS FOR BANK OF AMERICA  
CORP.**

**OF COUNSEL:**

Charles G. King  
Bar No. 11470000  
S.D. ID. 1344  
**KING & PENNINGTON LLP**  
711 Louisiana Street, Suite 3100  
Houston, Texas 77002  
Telephone: (713) 225-8404  
Telecopier: (713) 224-8488

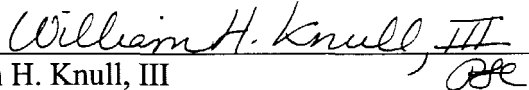
**ATTORNEYS FOR BANK OF AMERICA  
CORP.**



Barry Abrams  
Texas Bar No. 00822700  
S.D. ID. 2138  
**ABRAMS, SCOTT & BICKLEY, LLP**  
Chase Tower, 600 Travis, Suite 6601  
Houston, Texas 77002  
Telephone: (713) 228-6601  
Telecopier: (713) 228-6605

David Braff  
Anthony M. Candido  
Adam R. Brebner  
**SULLIVAN & CROMWELL**  
125 Broad Street  
New York, New York 10004-2498  
Telephone: (212) 558-4000  
Telecopier: (212) 558-3588

**ATTORNEYS FOR BARCLAYS PLC**

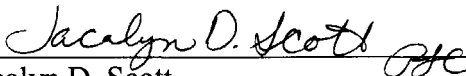


William H. Knull, III  
Texas Bar No. 11636900  
S.D. ID. 7701  
**MAYER, BROWN, ROWE & MAW**  
700 Louisiana Street, Suite 3600  
Houston, Texas 77002-2730  
Telephone: (713) 221-1651  
Telecopier: (713) 224-6410

**ATTORNEY-IN-CHARGE FOR CANADIAN  
IMPERIAL BANK OF COMMERCE  
OF COUNSEL:**

Alan N. Salpeter  
Michele Odorizzi  
T. Mark McLaughlin  
**MAYER, BROWN, ROWE & MAW**  
190 South LaSalle Street  
Chicago, Illinois 60603  
Telephone: (312) 782-0600  
Telecopier: (312) 701-7711

**ATTORNEYS FOR CANADIAN IMPERIAL  
BANK OF COMMERCE**

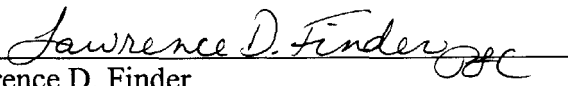
  
Jacalyn D. Scott  
SBN: 17899900  
3000 One Houston Center  
**WILSHIRE, SCOTT & DYER, P.C.**  
1221 McKinney  
Houston, TX 77010  
Telephone: (713) 651-1221  
Telecopier: (713) 651-0020

**ATTORNEY-IN-CHARGE FOR CITIGROUP,  
INC.**

**OF COUNSEL:**

Brad S. Karp  
Mark F. Pomerantz  
Richard A. Rosen  
Michael E. Gertzman  
Claudia L. Hammerman  
Jonathan H. Hurwitz  
**PAUL, WEISS, RIFKIND, WHARTON &  
GARRISON**  
1285 Avenue of the Americas  
New York, New York 10019-6064  
Telephone: (212) 373-3000  
Telecopier: (212) 757-3990

**ATTORNEYS FOR CITIGROUP, INC.**



Lawrence D. Finder

S. D. ID. No. 602

Texas Bar No. 07007200

**HAYNES AND BOONE, LLP**

1000 Louisiana Street, Suite 4300

Houston, TX 77002-5012

Telephone: (713) 547-2000

Telecopier: (713) 547-2600

**ATTORNEY-IN-CHARGE FOR CREDIT  
SUISSE FIRST BOSTON CORP.**

**OF COUNSEL:**

Richard W. Clary

Julie A. North

**CRAVATH, SWAINE & MOORE**

Worldwide Plaza

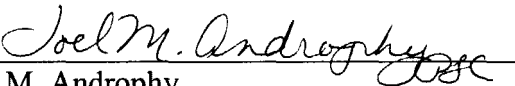
825 Eighth Avenue

New York, NY 10019-7475

Telephone: (212) 474-1000

Telecopier: (212) 474-3700

**ATTORNEYS FOR CREDIT SUISSE  
FIRST BOSTON CORP.**



Joel M. Androphy

Texas Bar No. 01254700

B. Elizabeth Klein

Texas Bar No. 24032515

Wade T. Howard

Texas Bar No. 00787725

**BERG & ANDROPHY**

3704 Travis

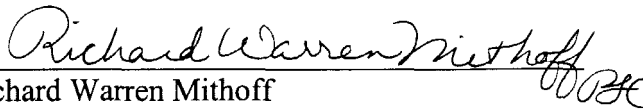
Houston, Texas 77002

Telephone: (713) 529-5622

Telecopier: (713) 529-3785

Lawrence Byrne  
Owen C. Pell  
Lance Croffoot-Suede  
**WHITE & CASE, LLP**  
1155 Avenue of the Americas  
New York, New York 10036-2787  
Telephone: (212) 819-8200  
Telecopier: (212) 354-8113

**ATTORNEYS FOR DEUTSCHE BANK AG**

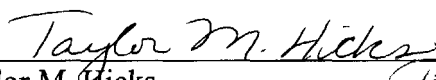

  
Richard Warren Mithoff  
**Attorney-in-Charge**  
Texas Bar No. 14228500  
S.D. ID. 2102  
Janie L. Jordan  
Texas Bar No. 11012700  
S.D. ID. 17407  
**MITHOFF & JACKS, L.L.P.**  
One Allen Center, Penthouse  
500 Dallas Street, Suite 3450  
Houston, TX 77002  
Telephone: (713) 654-1122  
Telecopier: (713) 739-8085

**OF COUNSEL:**

Charles A. Gall  
Texas Bar No. 07281500  
S.D. ID. 11017  
James W. Bowen  
Texas Bar No. 02723305  
S.D. ID. 16337  
**JENKENS & GILCHRIST, A PROFESSIONAL CORPORATION**  
1445 Ross Avenue, Suite 3200  
Dallas, TX 75202  
Telephone: (214) 855-4500  
Telecopier: (214) 855-4300

Bruce D. Angiolillo  
Thomas C. Rice  
David J. Woll  
Jonathan K. Youngwood  
**SIMPSON THACHER & BARTLETT**  
425 Lexington Avenue  
New York, New York 10017  
Telephone: (212) 455-2000  
Telecopier: (212) 455-2502

**ATTORNEYS FOR J.P. MORGAN CHASE &  
CO.**

  
Taylor M. Hicks   
Texas Bar No. 09585000  
S.D. ID. 3079  
**HICKS THOMAS & LILIENSTERN, LLP**  
700 Louisiana, Suite 1700  
Houston, Texas 77002  
Telephone: (713) 547-9100  
Telecopier: (713) 547-9150



**ATTORNEY-IN-CHARGE FOR MERRILL  
LYNCH & CO., INC.**

OF COUNSEL:

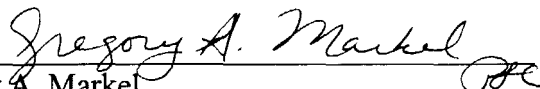
Herbert S. Washer  
James D. Miller  
Ignatius A. Grande  
**CLIFFORD CHANCE US LLP**  
200 Park Avenue  
New York, New York 10166  
Telephone: (212) 878-8000  
Telecopier: (212) 878-8375

Robert F. Serio  
Mitchell A. Karlan  
Marshall R. King  
**GIBSON, DUNN & CRUTCHER LLP**  
200 Park Avenue  
New York, New York 10166  
Telephone: (212) 351-4000  
Telecopier: (212) 351-4035

**ATTORNEYS FOR MERRILL LYNCH & CO.,  
INC.**

**CERTIFICATE OF CONFERENCE**

On October 4, 2002, I conferred with counsel for The Regents of the University of California regarding this Motion. The Regents oppose this motion.

  
\_\_\_\_\_  
Gregory A. Markel

## **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing instrument was served on all counsel on the attached service list electronically via the [www.esl3624.com](http://www.esl3624.com) website or as otherwise indicated in the Court's prior orders.

  
Patricia L. Casey

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The Exhibit(s) May  
Be Viewed in the  
Office of the Clerk